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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH HARMON, Defendant and Appellant.	B204505 (Los Angeles County Super. Ct. No. BA 317753)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed as modified and remanded with directions.

Joan Wolff, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Joseph Harmon of assault by means likely to produce great bodily harm (Pen. Code, § 245, subd. (a)),[1] and found true the allegation that in the commission of the assault he personally inflicted great bodily injury in circumstances involving domestic violence (§ 12022.7, subd. (e)). The jury also convicted Harmon of mayhem (§ 203). Harmon appeals from the judgment claiming that the trial court erred in (1) imposing upper terms on the convictions and enhancement, (2) failing to stay the concurrent term imposed on the mayhem conviction, (3) imposing a $20 DNA penalty assessment, and (4) failing to have the abstract of judgment accurately state his conviction was for assault by means of force likely to produce great bodily injury. Harmon also contends trial counsel provided ineffective assistance by failing to object to the court's improper use of the factual elements of the crimes and enhancement to impose the upper terms. We conclude the error in imposing upper terms on the convictions and enhancement was harmless. Other of Harmon's claims of sentencing error, however, have merit and we will (1) modify the judgment to stay the concurrent term on the mayhem conviction, (2) strike the $20 DNA assessment, and (3) correct the abstract of judgment to accurately reflect that the assault conviction was by means likely to produce great bodily harm. We will also correct the judgment to impose an additional court security fee on the second conviction. As so modified, we affirm.

BACKGROUND

Joseph Harmon and Natalie Henry, who had been involved in a romantic relationship for three years, lived in separate units of the same apartment building. They ended the relationship on February 24, 2007. The next day Harmon came to Henry's apartment and told her to lower the volume on the music she was playing. He returned five minutes later, knocked on her door, and asked to use Henry's bathroom. After she let Harmon into her apartment, he became angry with her because she was wearing a short skirt. He "hollered" at Henry, cursed at her, and told her "he can't make a ho out of

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[1] All further unmarked statutory references are to the Penal Code.

a housewife." She tried to kiss Harmon to calm him down but he was "real nasty" and turned his face away from her.

Harmon grabbed Henry around the neck and pulled her to the ground. He grabbed her nose, pulling her nose ring. She "holler[ed]" for help. When Harmon's mother came to the door Harmon dragged Henry across the room to the door. There, Harmon put his hands around her neck, choked her, and only released his grip when she kicked him in the groin. In response, Harmon punched Henry in her left eye and walked out, saying "now go tell your husband that." Harmon was wearing multiple rings on his hand when he struck Henry.

Harmon's blow broke the globe of Henry's left eye and destroyed the eye's lens, filled the chambers of her eyes with blood, and dislocated the eye's globe. Medical treatment did not restore her vision and Henry lost sight in her left eye.

Henry suffered from diabetes and underwent dialysis three times a week. She also suffered from severe diabetic retinopathy, as a complication of diabetes, and had lost most of the sight in her right eye because of the disease. She considered her left eye to be her "good eye" and had been relying on that eye to read, to pay bills, to sign checks and otherwise to care for herself. After Harmon's punch, she became legally blind in both eyes and unable to perform even routine activities.

An information charged Harmon with assault by means likely to produce great bodily injury (§ 245, subd. (a)) and mayhem (§ 203). As to the assault charge, the information also alleged the sentence enhancement that Harmon personally inflicted great bodily injury in circumstances involving domestic violence. (§ 12022.7, subd. (e).) The jury convicted Harmon as charged. The court sentenced Harmon to the upper term of four years on the assault conviction, plus an additional and consecutive upper term of five years on the great bodily injury enhancement. On the mayhem conviction, the trial court sentenced Harmon to the upper term of eight years and ordered that this sentence be served concurrently with the overall nine-year sentence imposed on the assault conviction. The court imposed (1) a $20 court security fee (§ 1465.8, subd. (a)(1)), (2) a $5,000 restitution fine (§ 1202.4, subd. (b)), (3) a $5,000 parole revocation fine (§

1202.45), and (4) a $20 DNA penalty assessment (Gov. Code, § 76104.7). Harmon appeals from the judgment of conviction.

DISCUSSION

Upper Terms

At sentencing, the trial court commented that Henry's "one good eye has been blinded because of a stupid punch in the heat of passion. That's really what happened. Now the woman is blind. She can't read anymore, can't write her checks anymore. [¶] Remember she said she used to be able to at least write her checks and pay her bills. She can't. The one good eye, which is maybe not as good as your own or my eye, but it was an eye she could function with, is gone. That's the state of this case." The court imposed upper terms on the convictions for assault by means of force likely to cause great bodily injury and mayhem and on the enhancement for great bodily injury, stating that "the crime involved great violence, causing the victim to lose sight in her one good eye. The victim was vulnerable, and the crime involved great bodily harm."

Harmon contends that (1) in violation of *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, the court improperly imposed upper terms based on facts not found by the jury, (2) the court improperly supported the upper term for each crime and the enhancement by relying on the factual elements of each crime and enhancement, respectively, in violation of the California Rules of Court, and (3) the court imposed the upper term on each crime and the enhancement based on an impermissible multiple use of the same fact: Harmon inflicted great bodily injury. Based on these errors, Harmon contends his sentence must be vacated and the cause remanded for resentencing. We disagree.

In response to the *Cunningham* decision, the Legislature amended the determinate sentencing law by urgency legislation effective March 30, 2007 to eliminate the statutory presumption favoring the middle term and to make the upper term the statutory maximum. (Stats. 2007, ch. 3, enacting Sen. Bill No. 40 (2007-2008 Reg. Sess.).) The Judicial Council amended the sentencing rules to conform to the new determinate sentencing law effective May 23, 2007. (See § 1170, subd. (c), as amended by Stats.

2007, ch. 3, § 2, § 1170.3 as amended by Stats. 2007, ch. 3, § 4.) Under rule 4.420 of the California Rules of Court, a sentencing court is now only required to specify *reasons* for its selection among the three available terms, "but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Because the upper term is the new statutory maximum, the sentencing judge may impose the maximum without jury findings to support it. Although the Supreme Court did not expressly hold that the new sentencing law was retroactive, invoking its authority to revise the determinate sentencing law in a manner to avoid constitutional problems and to effectuate the intent of the Legislature, the court held that the new legislation and rules should be applied to sentencing hearings held after the effective date of the legislation. Nonetheless, sentencing decisions are still to be reviewed for an abuse of discretion. (*People v. Sandoval, supra,* 41 Cal.4th at p. 847.)

Harmon committed the offense in February 2007, his trial occurred in September 2007, and the court sentenced him in November 2007. Thus, the amended versions of the statute and rules applied to the sentencing in this case under the authority of *People v. Sandoval, supra*, 41 Cal.4th at pages 853-857. Although Harmon disagrees with this aspect of the *Sandoval* decision, we are bound by the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

On the other hand, we agree with Harmon that the court erred in relying on two of the three reasons it articulated for imposing upper terms. In stating as reasons that, "the crime involved great violence, causing the victim to lose sight in her one good eye" and that "the crime involved great bodily harm," in the first phrase the trial court merely articulated an element of assault by means likely to produce great bodily injury and in the second phrase merely defined the element of the enhancement of infliction of great bodily injury. Thus, neither reason could justify imposing the upper term on the convictions for assault or mayhem, or on the enhancement. (See Cal. Rules of Court, rule 4.420 (c) [a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the enhancement and

does so]; (d) ["A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"].) Applying the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of review, Harmon has not, however, shown reversible error.

The third reason the court stated, namely that the victim was particularly vulnerable, is a valid reason for selection of the upper term, and particularly so in this case. (See § 1170, subd. (b) ["When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"]; Cal. Rules of Court, rule 4.421(a)(3) ["The victim was particularly vulnerable"].)

The record discloses several reasons not mentioned by the trial judge that justified imposing the upper term. (See Cal. Rules of Court, rule 4.420(b) [relevant circumstances in making a sentencing choice may be obtained from the case record and the probation officer's report, among other sources].)[2] As defense counsel pointed out at sentencing, Harmon had suffered two prior convictions: A misdemeanor assault on a peace officer in 2004, and a November 2006 felony conviction for possession of crack cocaine. Rule 4.421(b)(2) of the California Rules of Court provides that the circumstance a defendant's prior convictions as an adult are numerous, or that they are of increasing seriousness, are reasons a court may consider in selecting the upper term.

Further, Harmon committed the current offense while under a grant of deferred entry of judgment for his felony drug offense. Being on a grant of deferred entry of judgment was the functional equivalent of Harmon being on probation when he

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[2] Harmon contends that because the statute and rules require a sentencing court to state reasons for selecting a particular term this court should remand the matter rather than attempt to guess which additional reasons the court might have properly considered in making its sentencing choice. In support of his argument Harmon relies on the decision in *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1478-1483. *Cardenas* does not control here because its analysis turned largely on the peculiar facts before the court and its relevance is questionable to sentencing hearings held since the statutory amendment eliminating the requirement of jury findings on facts used to impose upper terms and since the Supreme Court's decisions in *People v. Sandoval*, *supra*, 41 Cal.4th 825 and in *People v. Towne* (2008) 44 Cal.4th 63.

committed his current crimes. (See *People v. Strong* (2006) 138 Cal.App.4th Supp. 1, 6 [deferred entry of judgment and diversion are properly viewed as specialized forms of probation]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 691 [diversion and deferred entry of judgment are similar in effect and purpose to probation]; § 1203 ["'probation' means the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer"].) The circumstance that Harmon committed his current offense while on a grant of this specialized form of probation is a reason to impose an upper term, and demonstrates that his prior performance on probation was unsatisfactory. (See Cal. Rules of Court, rule 4.421(b)(4) and (5).)

The trial court would not have abused its discretion had it relied on any of these additional reasons when imposing upper terms on both convictions and the enhancement. (See *People v. Sandoval*, *supra*, 41 Cal.4th at p. 847.) Given the many valid reasons for selecting upper terms, it is not reasonably probable that Harmon would achieve a more favorable result if the case were remanded for resentencing. Accordingly, we find the error harmless.[3]

Stay of Concurrent Sentence on the Mayhem Conviction

Harmon contends the trial court's failure to stay the eight-year concurrent term imposed on the mayhem conviction violated section 654 because the assault and the mayhem convictions were both based on the same act. The Attorney General concedes the point and we agree the contention has merit.

Section 654 precludes multiple punishments for a single act or an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294.) This section provides in part: "An act or omission that is punishable in different ways by different provisions

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3 In light of our finding that error in articulating adequate reasons for imposing the upper terms in this case was harmless, we need not decide whether Harmon forfeited the issue by failing to raise it at sentencing (*People v. Scott* (1994) 9 Cal.4th 331) nor decide whether counsel was ineffective for failing to object, because we necessarily conclude Harmon cannot establish the necessary element of prejudice to establish his claim of ineffective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694, 697; *People v. Prieto* (2003) 30 Cal.4th 226, 261.)

of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Here, the jury convicted Harmon of assault by means likely to produce great bodily injury and found true the allegation that in the commission of the assault he personally inflicted great bodily injury. The jury separately convicted Harmon of mayhem which by definition includes infliction of great bodily injury. (§ 203.) The evidence supporting both the mayhem conviction and the conviction for assault resulting in great bodily injury was the same, namely, the evidence that Harmon punched Henry once with his fist and destroyed her eye. His punch was a single act, and the same act which caused her great bodily injury.

Indeed, in closing argument, the prosecutor told the jury the evidence of the single overhanded blow to Henry's eye causing her injury established the necessary elements for convictions on both the assault and mayhem counts. In addition, at sentencing, the court referred to the criminal act underlying the crimes as a single act, namely, "a stupid punch in the heat of passion."

Because the single act of Harmon's punch causing blindness formed the basis of the great bodily injury in the commission of the assault conviction, as well as the mayhem conviction, the lesser sentence imposed on the mayhem conviction must be stayed. (See, e.g., *People v. Pearson* (1986) 42 Cal.3d 351, 359 ["when multiple convictions are based on a single act, as in this case, . . . the use of such convictions must not result in the defendant being 'punished under more than one' Penal Code provision"]; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1558-1559 [when a single act formed the basis for both the assault and mayhem convictions section 654 applied to stay punishment on the assault conviction].)

The $20 DNA Penalty Assessment

Harmon contends the trial court erred in imposing a $20 DNA penalty assessment under Government Code section 76104.7 because the court imposed no qualifying fine or

penalty on which to base the DNA penalty assessment. The People concede the error and we agree.

Government Code section 76104.7, subdivision (a) directs that penalty assessments must be imposed on "every fine, penalty, or forfeiture" for the DNA fund. (Gov. Code, § 76104.7, subd. (a).) By its express terms, however, the DNA penalty assessment does not apply to any restitution fine. (Gov. Code, § 76104.7, subd. (c)(1).) The DNA penalty assessment of Government Code section 76104.7 similarly does not apply to the $20 court security fee the court imposed under section 1465.8. (See § 1465.8, subd. (b) ["The penalties authorized by chapter 12 (commencing with Section 76000) of Title 8 of the Government Code, and the state surcharge authorized by Section 1465.7, do not apply to this fee"].)

Because the court only imposed a restitution fine, a parole revocation fine and a court security fee, there was no qualifying "fine, penalty or forfeiture" on which to base the $20 DNA penalty assessment.

Court Security Fee

The People argue the trial court erred in imposing only one $20 court security fee because Harmon was convicted of two offenses. Section 1465.8, subdivision (a)(1), the People point out, required the court to impose a $20 court security fee "on every conviction for a criminal offense." Accordingly, they request this court to correct the judgment to impose a second $20 court security fee. Harmon has not opposed the People's request.

A $20 court security fee under section 1465.8 is required to be imposed for each count for which a defendant is convicted. (See *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) We will order the judgment modified to impose the additional fee.

Assault Conviction in the Abstract of Judgment

Harmon contends, and the People agree, that the abstract of judgment must be corrected to accurately reflect his conviction for assault was by means likely to produce great bodily injury. (§ 245, subd. (a)(1).)

The information charged Harmon with, and the jury found him guilty of, assault by means likely to produce great bodily injury. (§ 245, subd. (a)(1).) The abstract of judgment, however, states that his conviction is for assault with a deadly weapon. We will order the abstract of judgment corrected to accurately reflect the crime of which he was convicted. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The cause is remanded with directions to the trial court to prepare a new abstract of judgment and to forward the modified judgment of conviction to the department of corrections and rehabilitation (1) staying punishment on the mayhem conviction, (2) striking the $20 DNA penalty assessment, (3) imposing $40 in court security fees under section 1465.8, and (4) stating that Harmon was convicted of assault by means likely to produce great bodily injury in count one. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

WEISBERG, J.*

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* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.